

MAR 05 2007

Atty. Docket No. ADV12 P-300A

CERTIFICATE OF FACSIMILE

I hereby certify that this paper, together with all enclosures identified herein, is being sent via facsimile to the U.S. Patent and Trademark Office at 571-273-8300 addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date indicated below. A total of 41 pages should be received.

03-05-07
Date

Jaclyn R. Folkema
Jaclyn R. Folkema

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Art Unit : 1761
Examiner : Thuy Tran Lien
Applicants : Cheree L. B. Stevens et al.
Appln. No. : 09/778,470
Filing Date : February 7, 2001
Confirmation No. : 4695
For : **WATER-DISPERSIBLE COATING COMPOSITION
FOR FRIED FOODS AND THE LIKE**

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION - 37 C.F.R. §41.37)

1. Transmitted herewith is the APPEAL BRIEF in this application, with respect to the Notice of Appeal filed on December 4, 2006.

2. **STATUS OF APPLICANTS**

This application is on behalf of:

☒ other than a small entity.

☐ a small entity.

3. **FEE FOR FILING APPEAL BRIEF**

Pursuant to 37 CFR §41.20(b)(2), the fee for filing the Appeal Brief is:

☒ other than a small entity \$500.00

☐ small entity \$250.00

03/06/2007 CCHAU1 00000046 162463 09778470

02 FC:1251 120.00 DA

Appeal Brief fee due: \$500.00

Applicant : Cheree L.B. Stevens et al.
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4. **EXTENSION OF TERM**

The proceedings herein are for a patent application and the provisions of 37 C.F.R. §1.136 apply.

(a) x Applicant petitions for an extension of time under 37 C.F.R. §1.136:

Extension (months)	Fee for other than <u>small entity</u>	Fee for <u>small entity</u>
<u> x </u> one month	\$120.00	\$60.00
<u> </u> two months	\$450.00	\$225.00
<u> </u> three months	\$1020.00	\$510.00
<u> </u> four months	\$1590.00	\$795.00

FEE: \$120.00

5. **TOTAL FEE DUE**

The total fee due is:

Appeal Brief fee: \$500.00
Extension fee (if any) \$120.00
TOTAL FEE DUE: \$620.00

6. **FEE PAYMENT**

 Attached are checks in the sum of \$_____ and \$_____.

 x Charge Deposit Account No. 16 2463 the sum of \$620.00

Applicant : Cheree L.B. Stevens et al.
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7. **FEE DEFICIENCY**

X If any additional extension and/or fee is required, this is a request therefor
to charge Deposit Account No. 16 2463.

Respectfully submitted,

3/5/2007
Date

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TAV/jrf

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Art Unit : 1761
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MAR 05 2007FOURTH DECLARATION OF JOHN STEVENS

I, John Stevens, do hereby declare as follows:

1. I am the Vice President for Research and Development for Advanced Food Technologies, assignee of the present patent application. I graduated from Cornell University with a Food Science Degree in 1970. I have had over 30 years experience in the food science industry. I have had extensive experience specifically in the food coatings area for 14 years, since 1989.

2. From 1989 to 1991, I was the Research and Development Manager for Universal Foods Corporation, where I directed coated french fry developments which resulted in 60 million dollars in additional annual sales for the company. I developed the first clear coat french fry, now having estimated market sales of over 1 billion pounds per year.

3. From 1991 to 1994, I was Director of Technical Services for McCain Foods, Inc. I directed all of the potato food coatings research for McCain Foods, Inc., including the development of marketed coatings.

4. From 1994-1996, I was the Research Manager for Miles Willard Company, directing all frozen and non-snack dehydrated potato development, including the development of a patented clear coat french fry product.

5. From 1996-1999, I was the Director of Northwest Region Technical Services for Newly Weds Foods, Inc. I established, staffed and directed all formula, process, specification, and commercialization of seasoned and clear coat french fry batters for all french fry processors and chain accounts throughout the United States. I developed and

commercialized a signature clear coat french fry for a major processor and for a major national chain account.

6. From 1999 to date, I have served as the Vice President of Research and Development for Advanced Food Technologies, Inc. .

7. In my opinion, the ratio of rice component to dextrin component claimed in the present application is critical and produces surprising and unexpected results.

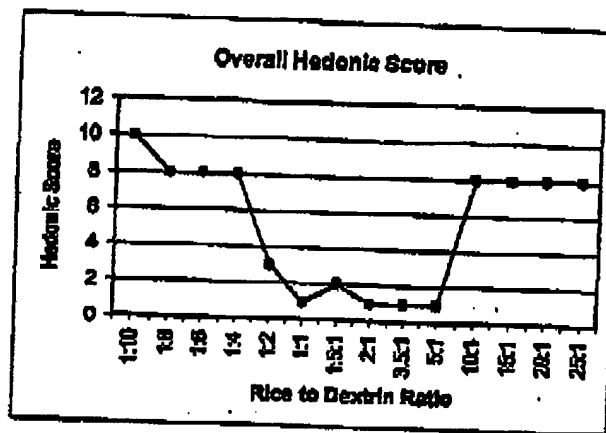
8. I supervised a laboratory experiment to test the crispness, toughness, tooth compaction and Munsell color of a food coating composition as applied to a french fried potato substrate. In order to demonstrate the unexpected results of the presently claimed invention, I compared the ratios of the claimed invention, namely a ratio of rice component to dextrin component of from about 1:2 to about 5:1, to a broader range of ratios outside of this range. I tested ratios above the claimed range, namely ratios of 1:10, 1:8, 1:6 and 1:4, and ratios below the claimed range, namely 10:1, 19:1, 20:1 and 25:1. The Control was a 2:1 ratio of rice component to dextrin component and was rated exactly as the 2:1 ratio sample demonstrated in the following results.

9. I conducted and supervised this experiment along with three other panelists (hereinafter collectively "Sensory Panelists"). The Sensory Panelists are only chosen if they do not smoke, do not have food allergies, and do not have any conditions which may affect their sense of taste, smell, feel and sight. The Sensory Panelists are specially trained to be familiar with the test methods, improve their ability to identify sensory attributes and improve their memory for test attributes. The Sensory Panelists are trained in french fry processing and french fry product quality attributes such as appearance, defect, texture and flavor, with particular attention given to heat lamp holding and its effects on the fry sensory attributes. The Sensory Panelists are also provided with actual samples to demonstrate various product descriptions for appearance and texture, including crispness, toughness, tooth compaction, and identification of the product's Munsell Color. The Sensory Panelists are also provided with demonstrations regarding the "life" of a french fry under a heat lamp, including flavor, aroma and texture. The Sensory Panelists are then trained on test procedure and the product evaluation form. The form is divided into appearance and texture questions, with further divisions relating to the specific attributes being tested. The Sensory Panelists next combine

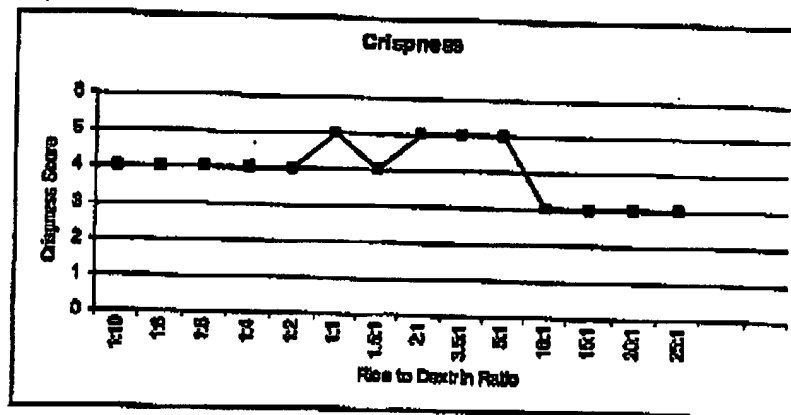
the scores of each of the product descriptions, such as crispness (as discussed more fully in paragraph 12), toughness (as discussed more fully in paragraph 13), tooth compaction (as discussed more fully in paragraph 14), and identification of the Munsell score (as discussed more fully in paragraph 15), to calculate the overall Hedonic score for each substrate (as discussed more fully in paragraph 11).

10. The samples were prepared in the following manner as dry mixes. One hundred sweet potatoes (substrate) were peeled to remove the skin, then cut using a 0.300" cross-sectional raw cut blade set giving a Long Fancy length grade (2-inch to 4-inch lengths). The substrate was blanched at about 180-185°F for about seven minutes until just slightly crisp. The substrate was dipped in 0.5% SAPF/1.0 % salt/water solution at 140°F for 40 seconds. The substrate was dried in a forced-air convection oven on "high" fan speed at 160°F for 14 minutes to get about 10-11% moisture loss, turning the substrate once half way through. The wet batter slurries were next prepared at 40% WBS (wet batter solids). In a five quart Kitchen-Aid, dry batter was wire whipped with the water and mixed for one minute on stir speed. Next, the eggs were scraped and mixed for five more minutes on speed level 2. Fifty-five grams of the raw substrate was next coated with batter having one of the rice to dextrin ratios tested, and then blown off lightly with an air knife, giving the Control a pick-up of 18-20%. The substrate is then pan-fried for approximately 50 seconds at 365°F in a deep fryer. The substrate was frozen for at least 24 hours and then reconstituted at the following specifications: 1.5 pounds at 350°F for 2.5 minutes. The substrate is then placed under a heat lamp, lightly salted, and evaluated over ten minutes.

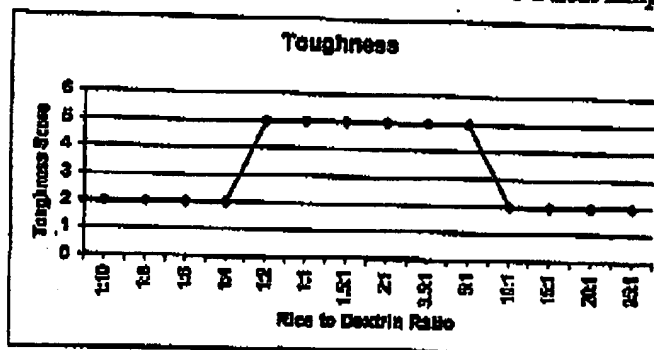
11. The Overall Hedonic Score of each sample is displayed in the graph below. The Overall Hedonic Score refers to a comparative score of products against a control product after reviewing all of the individual sensory parameter scores for each product, namely, crispness, toughness, tooth compaction and Munsell color results of the food coating composition as applied to a french fried substrate. A hedonic score of "1" ranks as the best possible product and a score of "10" ranks as the worst possible product. As you can see from the graph below, the samples which displayed the best Overall Hedonic Score were those samples comprising a ratio of rice component to dextrin component of from about 1:2 to about 5:1.



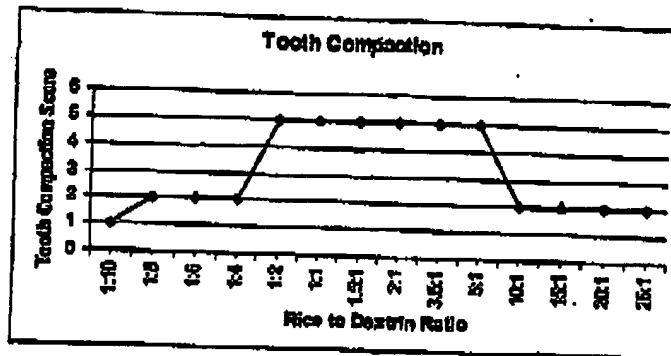
12. Crispness refers to the 'crack' (i.e. - hardness, brittleness) of the surface of the substrate as compared to the internal texture. The Sensory Panelists were given a five-point hedonic scale for rating the Crispness of the substrate as either 'Definitely Crisp' (which corresponded to a score of 5), 'Moderately Crisp' (which corresponded to a score of 4), 'Somewhat Crisp' (which corresponded to a score of 3), 'Slightly Crisp' (which corresponded to a score of 2), or 'No Crispness at all (Limp)' (which corresponded to a score of 1). As typically one of the key functions of the coating is to provide crispness, the best score would be 5 - Definitely Crisp. The below data demonstrates crispness after 10 minutes under a heat lamp.



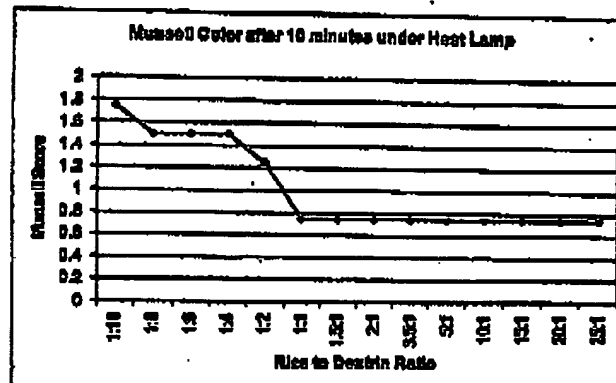
13. Toughness refers to the chewiness and elasticity of the coating as compared to the internal texture of the substrate. The Sensory Panelists were given a five-point hedonic scale for rating the Toughness of the substrate as either 'No Toughness at all' (which corresponded to a score of 5), 'Slightly Tough' (which corresponded to a score of 4), 'Somewhat Tough' (which corresponded to a score of 3), 'Moderately Tough' (which corresponded to a score of 2), or 'Definitely Tough' (which corresponded to a score of 1). As chewiness in a coating is typically undesirable, the best score would be 5 - No Toughness at all. The below data demonstrates toughness after 10 minutes under a heat lamp.



14. Tooth compaction refers to how much of the coating adheres to one's teeth while chewing the substrate. The Sensory Panelists were given a five-point hedonic scale for rating the Tooth Compaction of the substrate as either 'No Tooth Compaction' (which corresponded to a score of 5), 'Slight Tooth Compaction' (which corresponded to a score of 4), 'Some Tooth Compaction' (which corresponded to a score of 3), 'Moderate Tooth Compaction' (which corresponded to a score of 2), or 'Definite Tooth Compaction' (which corresponded to a score of 1). As coatings should not typically leave chewy fractions, the best score would be 5 - No Tooth Compaction. The below data demonstrates tooth compaction after 10 minutes under a heat lamp.



15. The Sensory Panellists also rated the substrates according to the Munsell Color test after ten (10) minutes under the heat lamp. The United States Department of Agriculture issues the Munsell Color Standards for Frozen French Fried Potatoes (Exhibit A), which designates a score to the different shades of color that is found on a french fried substrate. The score ranges from 000 to 4 (4 being very dark). Typically, "0" to "3/4" Munsell color is preferred, since much lighter product will typically look uncooked and much darker will typically look and probably taste burnt.



16. In my opinion, these results demonstrate the surprising and unexpected results which are found by using the food coating composition claimed in the present invention comprising a ratio of rice component to dextrin component of from about 1:2 to about 5:1 and the criticality of this ratio.

17. All statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true, and further, these statements are made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements may jeopardize the validity of this application or any patent issued thereon.

July 24, 2006
Date

John F. Stevens
John Stevens

Atty. Docket No. ADV12 P-300A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit : 1761
Examiner : Thuy Tran Lien
Applicants : Cheree L. B. Stevens et al.
Appln. No. : 09/778,470
Filing Date : February 7, 2001
Confirmation No. : 4695
For : **WATER-DISPERSIBLE COATING COMPOSITION
FOR FRIED FOODS AND THE LIKE**

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APPEAL BRIEF (37 CFR § 41.37)

This brief is in furtherance of the Notice of Appeal filed in this case on December 4, 2006.

Appellants ask that the fee required under § 41.20(b)(2) be charged to Deposit Account No. 16 2463. Additionally, if any additional fee(s) are required, Appellants ask that they too be charged to Deposit Account No. 16 2463.

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This brief contains these items under the following headings, and in the order set forth below (37 CFR § 41.37(c)(1)):

- I. Real Party in Interest
- II. Related Appeals and Interferences
- III. Status of Claims
- IV. Status of Amendments
- V. Summary of Claimed Subject Matter
 - A. Independent Claim 49
 - B. Independent Claim 92
- VI. Grounds of Rejection to be Reviewed on Appeal
- VII. Argument
 - A. Rejection Of Claims 49-51, 53-57, 61-63, 78-81, 83-85, 88-94, and 101-103 Under 35 U.S.C. § 102(b) As Being Anticipated By Baur et al.
 - 1. Claims 49-51, 53-54, 78-81, 83-85, 88-94, and 101-103
 - 2. Claims 55-57
 - 3. Claims 61-63
 - B. Rejection Of Claims 52, 58-60, 64-77, 80, 86-87, 95-100, and 104-110 Under 35 U.S.C. § 103(a) as Being Obvious Over Baur et al.
 - 1. Claims 52, 73-77, 80, 86-87, 95-100, 104-110
 - 2. Claims 58-60
 - 3. Claims 64-72
- VIII. Conclusion
- IX. Claims Appendix

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X. Evidence Appendix

XI. Related Proceedings Appendix

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I. Real Party in Interest

The real party in interest in this application is Advanced Food Technologies Inc., the assignment to which was recorded at Reel 011547, Frame 0243 on February 7, 2001.

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II. Related Appeals and Interferences

Appellants are aware of no appeals or interferences that would directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

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III. Status of Claims

This is an appeal from a Final Rejection of claims 49-81 and 83-111 of the above-identified application. Of the claims that have been or are currently presented in this application, claims 1-48, 82, and 112-124 have been cancelled and claims 49-81 and 83-111 are presently rejected. Claims 49-81 and 83-110, the claims on appeal, as last amended and entered on July 24, 2006, are attached hereto in the claims appendix.

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IV. Status of Amendments

All amendments found in this application have been entered. No amendments have been filed subsequent to the Final Rejection.

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V. Summary of Claimed Subject Matter

A. Independent Claim 49

Independent claim 49 defines a (a) food coating composition which comprises from about 25% to about 70% by weight of the composition (b) of a rice component and a dextrin component in a ratio of rice component to dextrin component of from about 1:2 to about 5:1, (c) said composition being free of a corn starch component.

Element (a) is a food coating composition which comprises from about 25% to about 70% by weight of the composition. Appellants submit that disclosure relating to a food coating composition comprising from about 25% to about 70% by weight of the composition is provided at least at page 4, lines 19, 22, and 26 of the originally filed specification.

Element (b) is a rice component and a dextrin component in a ratio of rice component to dextrin component of from about 1:2 to about 5:1. Appellants submit that disclosure relating to a rice component and a dextrin component in a ratio of rice component to dextrin component of from about 1:2 to about 5:1 is provided at least at page 5, lines 5-8; Example 4 (page 13, lines 13-19).

Element (c) is the composition being free of a corn starch. Appellants submit that disclosure relating to the composition being free of corn starch is provided at least at page 4, line 29 through page 5, line 4; Examples 2-4 (page 12, line 23 through page 13, line 19); and Table 1 (page 10, lines 1-2).

B. Independent Claim 92

Independent claim 92 defines (a) a method of providing increased surface crispness and holding time to a food substrate comprising (b) a step of applying a coating composition to the food substrate prior to finish cooking the food substrate, wherein the (c) coating composition

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comprises from about 25% to about 70% by weight of the combination (d) of a rice component and a dextrin component in a ratio of rice component to dextrin component from about 1:2 to about 5:1, (e) said coating composition being free of a corn starch component.

Element (a) is a method of providing increased surface crispness and holding time to a food substrate. Appellants submit that disclosure relating to a method of providing increased surface crispness and holding time to a food substrate is provided at least at page 4, lines 10-16; page 4, lines 29-31; page 5, lines 26-31; page 6, lines 1-4; and page 6, lines 25-31.

Element (b) is the step of applying a coating composition to the food substrate prior to finish cooking the food substrate. Appellants submit that disclosure relating to the step of applying a coating composition to the food substrate prior to finish cooking the food substrate is provided at least at page 8, line 19 through page 9, line 10; page 11, lines 1-4; and page 13, lines 21-26.

Element (c) is the coating composition comprising from about 25% to about 70% by weight of the combination. Appellants submit that disclosure relating to the coating composition comprising from about 25% to about 70% by weight of the combination is provided at least at page 4, lines 19, 22, and 26.

Element (d) is a rice component and a dextrin component in a ratio of rice component to dextrin component from about 1:2 to about 5:1. Appellants submit that disclosure relating to a rice component and a dextrin component in a ratio of rice component to dextrin component from about 1:2 to about 5:1 is provided at page 5, lines 5-8; Example 4 (page 13, lines 13-19).

Element (e) is the coating composition being free of a corn starch component. Appellants submit that disclosure relating to the coating composition being free of corn starch

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is provided at least at page 4, line 29 through page 5, line 4; Examples 2-4 (page 12, line 23 through page 13, line 19); and Table 1 (page 10, lines 1-2).

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VI. Grounds of Rejection to be Reviewed on Appeal

1. Claims 49-51, 53-54, 78-81, 83-85, 88-94, and 101-103 stand rejected under 35 U.S.C. § 102(b) as being anticipated by WO94/21143 to Baur et al.
2. Claims 55-57 stand rejected under 35 U.S.C. § 102(b) as being anticipated by WO94/21143 to Baur et al.
3. Claims 61-63 stand rejected under 35 U.S.C. § 102(b) as being anticipated by WO94/21143 to Baur et al.
4. Claims 52, 73-77, 80, 86-87, 95-100, 104-110 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Baur et al.
5. Claims 58-60 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Baur et al.
6. Claims 64-72 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Baur et al.

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VII. Argument

A. Rejection Of Claims 49-51, 53-57, 61-63, 78-81, 83-85, 88-94, and 101-103 Under 35 U.S.C. § 102(b) As Being Anticipated By Baur et al..

1. Claims 49-51, 53-54, 78-81, 83-85, 88-94, and 101-103

Of this group of claims, claims 49 and 92 are independent claims. Claims 50-51, 53-54, 78-81, 83-85, and 88-91 depend from claim 49. Claims 93-94 and 101-103 depend from claim 92. All of these claims are rejected as being anticipated over Baur et al.

As further discussed below, Appellants respectfully submit that Baur et al. does not anticipate the pending claims. In the final Office Action mailed on October 3, 2006, the Examiner stated:

Since the composition include [sic] modified potato starch or cornstarch, rice flour or corn flour, Baur et al. disclose embodiment [sic] in which the composition includes modified potato starch and rice flour. The amounts of rice flour and dextrin falls within the ranges claimed; thus, the ratio also falls within the ranges claimed.

Appellants respectfully submit that in order to anticipate pending claimed range, the claimed subject matter "must be disclosed in the reference with sufficient specificity to constitute an anticipation under the statute." MPEP § 2131.03; see also *Atofina v. Great Lakes Chem. Corp.*, 441 F.3d 991 (Fed. Cir. 2006). Last year, in *Atofina*, the Federal Circuit considered whether a patent directed to a method of synthesizing difluoromethane through a gas phase fluorination in the presence of oxygen and a catalyst within a particular temperature range was anticipated by the broad disclosure of a Japanese reference. *Atofina*, 441 F.3d at 990-99. The Court stated that "[i]t is well established that the disclosure of a genus in the prior art is not necessarily a disclosure of every species that is the member of a genus." *Id.* at 999. The Court ultimately held that a disclosure of a temperature range of 100-500°C did not

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anticipate a claim limitation of a temperature range of 330-450°C, even though the disclosure "is broader than and fully encompasses the specific temperature range claim" of the claimed invention. *Id.* at 999. The Court also held the disclosure of a 0.001 to 1.0% molar ratio range in the prior art did not anticipate the claimed range of 0.1 to 5.0% molar ratio since "no reasonable fact finder could determine that this overlap describes the entire claimed range with sufficient specificity to anticipate this limitation of the claim." *Id.* at 1000.

In this case, like *Atofina*, the cited reference, Baur et al., does not disclose the claimed subject matter with sufficient specificity to constitute anticipation. Appellants respectfully submit that the Baur et al. reference does not indicate with sufficient specificity the critical ratio of rice component to dextrin component as claimed in the pending application. In fact, Baur et al. apparently consider a different ratio to be important. The only disclosure in the Baur et al. reference relating to a ratio range of dextrin to any other component is the ratio range of dextrin to total starch of the composition.

Additionally and significantly, the Baur et al. reference contains a disclosure which is extraordinarily broad concerning (1) flour and (2) corn starch and/or potato starch. In fact, the disclosure by Baur et al. states in Table 1 that the flour could comprise rice flour or corn flour. Similarly, Table 1 states that the composition may contain modified corn and/or potato starch. Any of the extraordinary number of combinations of corn starch alone or corn and potato starch within this range is outside of the presently claimed invention as the claims state that the composition is free of a cornstarch component. Additionally, according to Baur et al., rice flour may be omitted and corn flour used instead. In view of the fact that the Baur et al. reference discloses such enormously broad ranges and alternative ingredients, it does not disclose the criticality of the ratio range of rice component to dextrin component.

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Accordingly, Appellants respectfully assert that the Baur et al. reference does not anticipate the pending claims.

2. Claims 55-57

Claims 55-57 depend from independent claim 49. Claims 55-57 were rejected as anticipated over Baur et al. For at least the reasons discussed above with regard to claim 49, Appellants respectfully submit that claims 55-57 are not anticipated by Baur et al.

In addition, this group claims a narrower ratio range of rice component to dextrin component than independent claim 49, namely a ratio range of rice component to dextrin component from about 1:1 to about 5:1. Accordingly, for at least the reasons discussed above, Appellants respectfully submit the Baur et al. reference does not anticipate claims 55-57.

3. Claims 61-63

Claims 61-63 depend from independent claim 49. Claims 55-57 were rejected as anticipated over Baur et al. For at least the reasons discussed above with regard to claim 49, Appellants respectfully submit that claims 55-57 are not anticipated by Baur et al.

In addition, this group claims a narrower ratio range of rice component to dextrin component than independent claim 49, namely a ratio range of rice component to dextrin component from about 2:1 to about 3.5:1. Accordingly, for at least the reasons discussed above, Appellants respectfully submit the Baur et al. reference does not anticipate claims 61-63.

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B. Rejection Of Claims 52, 58-60, 64-77, 80, 86-87, 95-100, and 104-110 Under 35 U.S.C. § 103(a) as Being Obvious Over Baur et al.

1. Claims 52, 73-77, 80, 86-87, 95-100, and 104-110

Of this group of claims, claims 52, 73-77, 80, and 86-87 depend from claim 49. Claims 95-100 and 104-110 depend from claim 92. All of these claims are rejected as obvious over Baur et al. Under MPEP § 2144.05, Appellants can overcome an obviousness rejection based on the overlapping ranges by showing the criticality of the claimed range. Appellants have submitted the Fourth Declaration of John Stevens dated July 21, 2006, which demonstrates the surprising and unexpected results of the presently claimed compositions and also demonstrates the criticality of the rice/dextrin ratio range. (Fourth Decl. of John Stevens ¶¶7-16).

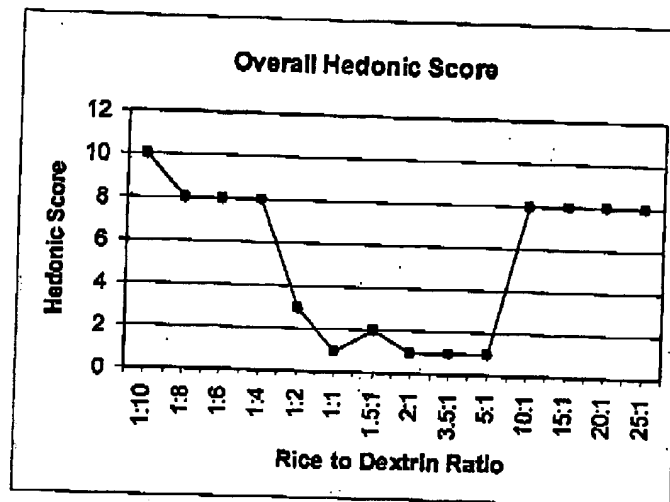
John Stevens conducted and supervised testing of coating compositions on a french fry and their evaluation. (Fourth Decl. of John Stevens ¶¶8-9). Samples were prepared in the following manner as dry mixes. (Fourth Decl. of John Stevens ¶10). One hundred count potatoes (substrate) were peeled to remove the skin, then cut using a 0.300" cross-sectional raw cut blade set giving a Long Fancy length grade (2-inch to 4-inch lengths). (Fourth Decl. of John Stevens ¶10). The substrate was blanched at about 180-185°F for about seven minutes until just slightly crisp. (Fourth Decl. of John Stevens ¶10). The substrate was dipped in 0.5% SAPP/1.0% salt/water solution at 140°F for 40 seconds. (Fourth Decl. of John Stevens ¶10). The substrate was dried in a forced-air convection oven on "high" fan speed at 160°F for 14 minutes to get about 10-11% moisture loss, turning the substrate once half way through. (Fourth Decl. of John Stevens ¶10). The wet batter slurries were next prepared at 40% WBS (wet batter solids). (Fourth Decl. of John Stevens ¶10). In a five quart Kitchen-Aid, dry

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batter was wire whipped with the water and mixed for one minute on stir speed. (Fourth Decl. of John Stevens ¶10). Next, the edges were scraped and mixed for five more minutes on speed level 2. (Fourth Decl. of John Stevens ¶10). Fifty-five grams of the raw substrate was next coated with batter having one of the rice to dextrin ratios tested, and then blown off lightly with an air knife, giving the Control a pick-up of 18-20%. (Fourth Decl. of John Stevens ¶10). The substrate was then par-fried for approximately 50 seconds at 365°F in a deep fryer. (Fourth Decl. of John Stevens ¶10). The substrate was frozen for at least 24 hours and then reconstituted at the following specifications: 1.5 pounds at 350°F for 2.5 minutes. (Fourth Decl. of John Stevens ¶10). The substrate is then placed under a heat lamp, lightly salted, and evaluated over ten minutes. (Fourth Decl. of John Stevens ¶10).

The Overall Hedonic Score of each sample is displayed in the graph below. The Overall Hedonic Score refers to a comparative score of products against a control product after reviewing all of the individual sensory parameter scores for each product, namely, crispness, toughness, tooth compaction and Munsell color results of the food coating composition as applied to a french fried substrate. (Fourth Decl. of John Stevens ¶11). A hedonic score of "1" ranks as the best possible product and a score of "10" ranks as the worst possible product. (Fourth Decl. of John Stevens ¶11). As you can see from the graph below, the samples which displayed the best Overall Hedonic Score were those samples comprising a ratio of rice component to dextrin component of from about 1:2 to about 5:1. (Fourth Decl. of John Stevens ¶11).

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(Fourth Decl. of John Stevens ¶ 11).

Specifically, Appellants' results show that the ratio of rice component to dextrin component of the claimed invention produces unexpected and surprising results with regard to the crispness, toughness, tooth compaction and Munsell color of the substrates produced in accordance with this invention. (Fourth Decl. of John Stevens ¶¶11-16). Appellants respectfully submit that these results demonstrate the surprising and unexpected results which are found by using the food coating composition claimed in the present invention comprising a ratio range of rice component to dextrin component of from about 1:2 to about 5:1 and the criticality of this ratio range. (Fourth Decl. of John Stevens ¶16). In view of the fact that the Baur et al. reference does not disclose or suggest the critical ratio range of rice component to dextrin component and the surprising and unexpected results demonstrated above and in the accompanying Fourth Declaration of John Stevens, Appellants respectfully submit that the pending claims would not have been obvious and are in condition for allowance.

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2. Claims 58-60

Claims 58-60 depend from claim 49. All of these claims are rejected as being obvious over Baur et al. For at least the reasons discussed above with regard to claim 49, Appellants respectfully submit that claims 58-60 would not have been obvious in view of Baur et al.

In addition, this group claims a narrower ratio range of rice component to dextrin component than independent claim 49, namely a ratio range of rice component to dextrin component from about 1:1 to about 5:1. Accordingly, for at least the reasons discussed above, Appellants respectfully submit that claims 58-60 would not have been obvious in view of Baur et al.

3. Claims 64-72

Claims 64-72 depend from claim 49. All of these claims are rejected as being obvious over Baur et al. For at least the reasons discussed above with regard to claim 49, Appellants respectfully submit that claims 64-72 would not have been obvious in view of Baur et al.

In addition, this group claims a narrower ratio range of rice component to dextrin component than independent claim 49, namely a ratio range of rice component to dextrin component from about 2:1 to about 3.5:1. Accordingly, for at least the reasons discussed above, Appellants respectfully submit that claims 64-72 would not have been obvious in view of Baur et al.

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VIII. Conclusion

For the reasons set forth above, when properly considering the cited reference, and as is apparent from examining the invention defined by claims 49-81 and 83-110, these define patentable subject matter. Accordingly, reversal of the rejections of these claims under 35 U.S.C. §§ 102(b) and 103(a) is appropriate and respectfully solicited.

Respectfully submitted,

CHEREE L. B. STEVENS ET AL.

By: PRICE, HENEVELD, COOPER,
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3/5/2007
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IX. Claims Appendix (37 CFR §41.27(c)(1)(viii))

Claim 49. A food coating composition comprising from about 25% to about 70% by weight of the combination of a rice component and a dextrin component in a ratio of rice component to dextrin component of from about 1:2 to about 5:1, said composition being free of a corn starch component.

Claim 50. The food coating composition of claim 49, wherein the rice component comprises up to about 35% by weight of the solids content of the composition.

Claim 51. The food coating composition of claim 50 further comprising from about 25% to about 45% by weight potato starch.

Claim 52. The food coating composition of claim 51, wherein the potato starch is a modified ungelatinized low-amylose content potato starch.

Claim 53. The food coating composition of claim 52 further comprising at least about 1% of at least one leavening agent.

Claim 54. The food coating composition of claim 53 further comprising at least about 0.1% of at least one stabilizing agent.

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Claim 55. The food coating composition of claim 49 wherein the ratio of rice component to dextrin component is from about 1:1 to about 5:1.

Claim 56. The food coating composition of claim 55, wherein the rice component comprises up to about 30% by weight of the solids content of the composition.

Claim 57. The food coating composition of claim 56 which further comprises potato starch.

Claim 58. The food coating composition of claim 57, wherein the potato starch is a modified ungelatinized low-amylose content potato starch.

Claim 59. The food coating composition of claim 58 further comprising at least about 1% of at least one leavening agent.

Claim 60. The food coating composition of claim 59 further comprising at least about 0.1% of at least one stabilizing agent.

Claim 61. The food coating composition of claim 49, wherein the ratio of the rice component to the dextrin component is from about 2:1 to about 3.5:1.

Claim 62. The food coating composition of claim 61, wherein the rice component comprises up to about 30% by weight of the solids content of the composition.

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Claim 63. The food coating composition of claim 62 further comprising from about 25% to about 50% by weight potato starch.

Claim 64. The food coating composition of claim 62 further comprising a modified ungelatinized low-amylose content potato starch.

Claim 65. The food coating composition of claim 64 further comprising at least about 1% of at least one leavening agent.

Claim 66. The food coating composition of claim 65 further comprising at least about 0.1% of at least one stabilizing agent.

Claim 67. The food coating composition of claim 66, wherein the stabilizing agent comprises methylcellulose.

Claim 68. The food coating composition of claim 66, wherein the stabilizing agent comprises xanthan gum.

Claim 69. The food coating composition of claim 66 further comprising at least about 0.1% of at least one color agent component.

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Claim 70. The food coating composition of claim 69, wherein the color agent component comprises a color agent component selected from the group consisting of corn syrup solids, sucrose, whey, derivatives thereof, and combinations thereof.

Claim 71. The food coating composition of claim 66 further comprising at least about 1% of a salt component or derivative thereof.

Claim 72. The food coating composition of claim 64, wherein the dextrin component comprises up to about 30% by weight of the solid contents of the composition.

Claim 73. The food coating composition of claim 49, wherein the rice component comprises a rice component selected from the group consisting of a short-grain rice flour component, a medium-grain rice flour component, a long-grain rice flour component, and mixtures thereof.

Claim 74. The food coating composition of claim 73, wherein the dextrin component comprises a dextrin component selected from the group consisting of corn dextrin, tapioca dextrin, potato dextrin, derivatives thereof, and mixtures thereof.

Claim 75. The food coating composition of claim 73, wherein the dextrin component comprises corn dextrin.

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Claim 76. The food coating composition of claim 74, wherein the dextrin component comprises a high-solubility dextrin.

Claim 77. The food coating composition of claim 74, wherein the dextrin component comprises a low-solubility dextrin.

Claim 78. The food coating composition of claim 49, wherein the composition further comprises an adherent.

Claim 79. The food coating composition of claim 78, wherein the adherent comprises a potato starch component.

Claim 80. The food coating composition of claim 79, wherein the potato starch component comprises a modified ungelatinized low-amylose content potato starch.

Claim 81. The food coating composition of claim 79, wherein the potato starch component comprises up to about 50% by weight of the composition.

Claim 83. The food coating composition of claim 49 further comprising at least about 1% of at least one leavening agent.

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Claim 84. The food coating composition of claim 83, wherein the leavening agent comprises a leavening agent selected from the group consisting of an edible acid, an edible carbonate, derivatives thereof, and combinations thereof.

Claim 85. The food coating composition of claim 83, wherein the leavening agent comprises a combination of sodium acid pyrophosphate and sodium bicarbonate.

Claim 86. The food coating composition of claim 83 further comprising at least about 1 % of at least one sweetening ingredient component.

Claim 87. The food coating composition of claim 86, wherein the sweetening ingredient component comprises sugar.

Claim 88. The food coating composition of claim 49 further comprising at least about 0.1 % of at least one stabilizing agent.

Claim 89. The food coating composition of claim 88, wherein the stabilizing agent comprises a stabilizing agent selected from the group consisting of a cellulose ether, a natural gum, an alginate, a polyalcohol, a water-soluble polymer, derivatives thereof, and combinations thereof.

Claim 90. The food coating composition of claim 49 further comprising a quantity of water mixed with the composition to form a slurry.

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Claim 91. The food coating composition of claim 90, wherein the total slurry composition comprises about 30% to about 50% of dry coating composition based upon the total weight of the water and dry-mix components.

Claim 92. A method of providing increased surface crispiness and holding time to a food substrate comprising a step of:

applying a coating composition to the food substrate prior to finish cooking the food substrate, wherein the coating composition comprises from about 25% to about 70% by weight of the combination of a rice component and a dextrin component in a ratio of rice component to dextrin component from about 1:2 to about 5:1, said coating composition being free of a corn starch component.

Claim 93. The method of claim 92 further comprising the steps of combining the coating composition with a sufficient quantity of water to form a slurry, and applying the slurry to the food substrate.

Claim 94. The method of claim 93 further comprising the steps of pre-cooking and freezing the food substrate after coating the food substrate with the coating composition, and subsequently reconstituting the pre-cooked, coated, and frozen food substrate by using at least one of a gradient heat source, microwave, or fryer.

Claim 95. The method of claim 94 further comprising the step of conditioning the food substrate by contacting it with a predetermined liquid prior to coating it with the composition.

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Claim 96. The method of claim 92, wherein the coating composition comprises up to about 30% by weight rice component of the solids content of the composition and the rice component comprises a rice flour selected from the group consisting of a short-grain rice flour component, a medium-grain rice flour component, a long-grain rice flour component, derivatives thereof, and combinations thereof.

Claim 97. The method of claim 96, wherein the coating composition comprises a dextrin component wherein the dextrin component comprises up to about 30% by weight of the solids content of the coating composition and the dextrin component comprises a dextrin component selected from the group consisting of a corn dextrin, a tapioca dextrin, a potato dextrin, derivatives thereof, and combinations thereof.

Claim 98. The method of claim 96, wherein the dextrin is a corn dextrin.

Claim 99. The method of claim 97, wherein the food coating composition further comprises a modified ungelatinized potato starch, wherein the ungelatinized potato starch comprises up to about 50% by weight of the solids content of the composition.

Claim 100. The method of claim 99, wherein the coating composition further comprises at least about 1% of at least one leavening agent, at least about 1% of at least one sweetening component, at least about 1% of at least one salt component, at least about 0.1% of at least one stabilizing agent component, and at least about 0.1% of at least one color agent component.

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Claim 101. The method of claim 92, wherein the coating composition is applied to the food substrate as a dry mix of ingredients.

Claim 102. The method of claim 101 further comprising the step of freezing the dry-mix coated food substrates without first parfrying them.

Claim 103. The method of claim 102 further comprising the step of finish cooking the coated food substrates after the food substrates have been frozen without parfrying.

Claim 104. The method of claim 102 further comprising the steps of cooking the coated food substrates after they have been frozen, holding the cooked coated food substrates for up to about 45 minutes, and then re-heating the held food substrates to serving temperature for consumption.

Claim 105. The method of claim 104, wherein the holding step is carried out at room temperature.

Claim 106. The method of claim 104, wherein the holding step is carried out under a heat source.

Claim 107. The method of claim 101, wherein the coated food substrates are finish-cooked after coating and without freezing.

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Claim 108. The method of claim 107 further comprising the steps of holding the cooked coated food substrates for up to about 45 minutes and re-heating the held food substrates to serving temperature for consumption.

Claim 109. The method of claim 108, wherein the holding step is carried out at room temperature.

Claim 110. The method of claim 108, wherein the holding step is carried out under a heat source.

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X. Evidence Appendix (37 CFR § 41.37(c)(1)(ix))

Attached is a copy of the Fourth Declaration of John Stevens submitted along with Appellants' July 24, 2006, Response to the Office Action mailed January 24, 2006. The Examiner discussed and entered this Declaration in the Examiner's Final Office Action mailed on October 3, 2006. No other evidence entered by the Examiner is being relied upon by Appellants in this Appeal.

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XI. Related Proceedings Appendix (37 CFR §41.37(c)(1)(x))

There are no related appeals or interferences pending during this application.